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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER,
Petitioners,
vs.
STATE OF ALABAMA.
No. 749.

REPLY BRIEF AND ARGUMENT OF PETITIONERS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

A statement of matter involved..... 1

Reply brief and argument..... 2

Cases Cited.

Boyd v. State, 153 Ala. 41, 45 So. 591..... 8

Frank v. Mangum, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582..... 3

Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202. 5, 6

Howard v. Ky., 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189..... 3

Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549..... 4, 8

Jones v. State, 125 So. 384.....2, 8, 14

Lee v. State, 13 So. (2d) 591, 592.....11, 12, 13, 14

Lewis v. U. S., 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136..... 5, 6

Lowman v. State, 80 Fla. 18, 85 So. 166..... 5

McGee v. State, 117 So. 487.....3, 14

McNutt v. State, 25 Ala. 129, 142 So. 773..... 8

Parfet v. Kansas City Life Insurance Company, 128 Fed. (2d) 361, Certiorari Denied 63 S. Ct. 50, 317 U. S. 654, 87 L. Ed. 526..... 9

Snyder v. Mass., 291 U. S. 97, 78 L. Ed. 674..... 4

Whittaker v. State, 173 Ark. 1172, 294 S. W. 397..... 5, 8

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A.

A STATEMENT OF MATTER INVOLVED.

The statement of facts in the brief of respondent to the petition correctly quotes the record.

B.

REPLY BRIEF AND ARGUMENT.

It is the purpose of our reply brief and argument to show (a) that the propositions of law advanced by the respondent in its brief are not well taken and (b) to advance supplementary authority and argument in support of point I (original brief on submission, page 13), point II (original brief on submission, page 21) and point III (original brief on submission, page 23).

I.

It is respectfully submitted that the authorities cited by the respondent in support of his proposition I (pages 6 and 7, respondent's brief) do not conflict with our proposition set forth in point I of our original brief.

Rule 45 of the Supreme Court of Alabama (Appendix A, Respondent's Brief page 24) is not applicable by the very terms of the decision of the Supreme Court of Alabama.

In the case of Jones v. State, 125 So. 384, wherein Mr. Justice Bouldin, speaking for the Supreme Court of Alabama, said:

> "We must hold the doctrine of error without injury cannot be extended to denial of constitutional guaranties of this kind." Jones v. State, 125 So. 384.

And Justice Bouldin proceeded to reverse the Court of Appeals of Alabama in its opinion and judgment rendered in the same case and reported in 125 So. 382, wherein it had held that, since the evidence was undisputed, the failure of the Court to submit an issue to the jury was error without injury.

And, as late as 1928, the Court of Appeals of Alabama itself held that the doctrine of error without injury could not be applied in such cases.

In the case of McGee v. State, 117 So. 487, Judge Rice, speaking for the Court, said:

> "This court does not favor reversals of the judgments of the nisi prius courts on technical rulings which work no injury to the appellants. However, orderly procedure and regulated methods in the indictment, trial and conviction or acquittal of those charged with crime, **must** be preserved—otherwise we drift into chaos, thence on into anarchy." McGee v. State, 117 So. 487.

The case of Howard v. Ky., 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189, cited by respondent (page 6 Respondent's Brief), does not support respondent's contention.

In the Howard case the absence complained of referred to a mere preliminary proceeding **before the trial began** and Justice McKenna, in delivering that opinion, specifically pointed out that the absence of defendant occurred before the jury was sworn in and before the defendant was placed in jeopardy. Thus there was no denial of due process of law.

The case of Frank v. Mangum, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582, has no application here. The distinctions between the principles applicable to a hearing on petition for habeas corpus to secure release from custody upon commitment pursuant to a judgment regular upon its face, and the principles applicable to the review of a case upon direct appeal or application for writ of certiorari, are too obvious to require repetition here.

Leo Frank had had his trial in the nisi prius court of the State of Georgia, had voluntarily absented himself at the time the verdict was rendered, had made no objection thereto in the trial court, had made no motion for new

trial based upon this action of the Court, had appealed to the courts of last resort of the State of Georgia, had made application to the Supreme Court of the United States for writ of certiorari and which was denied. After the judgment had been seasoned and verified by affirmance of all these courts and after he was committed to custody pursuant to that judgment, he applied to the United States District Court in Georgia for a writ of habeas corpus. Clearly, the decision in such a case has no application to the case here under consideration.

Neither does the case of Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549, have application here.

The alleged denial of due process there consisted of no more than the expulsion of defendant from the court room while counsel for the Government and the defendant were arguing law to the Judge **in the absence of the jury**, and it further appears that the conduct of the Court in this respect was not made the basis of any exception by the defendant. It also appears that this was a minor, noncapital felony.

Yet, the Circuit Court of Appeals in the Johnson case, supra, took particular pains to say:

> "The defendant must be deemed to have the absolute right to hear everything which the jury hears if he is to protect himself. Under such circumstances, his presence bears a relation 'reasonably substantial to his opportunity to defend.' To exclude him from the court room upon such occasions would be to hazard his constitutional rights." Johnson v. U. S., supra, 129 Fed. (2d) 954.

Neither does the case of Snyder v. Mass., 291 U. S. 97, 78 L. Ed. 674, have application here.

The Snyder case, supra, deals with the absence of the defendant upon a "view" by the jury and it was held upon common-law principles that there was no fundamental

right of the defendant to be present at the "view." Thus, his absence at the "view" was not a denial of due process as that term is used in the Federal Constitution.

Nor can the case of Whittaker v. State, 173 Ark. 1172, 294 S. W. 397, have influence in controlling the decision of this case. Since the Whittaker case deals with a mere statutory misdemeanor where the defendant was voluntarily absent upon the reassembling of the jury, at which time the Court admonished the jury as to their duty, which in the absence of a showing in the bill of exceptions, the Supreme Court assumed to be merely the general perfunctory instructions such as, probably, that the jury were not to talk about the case to anyone nor to permit anyone to talk to them about the case, etc. Furthermore, we have seen that the rule making it essential to due process of law that the defendant in a capital case be present at every stage of his trial is subject to considerable relaxation in misdemeanor cases and minor felony cases.

On first blush, the case of Lowman v. State, 80 Fla. 18, 85 So. 166, cited by respondent in support of its proposition I (Respondent's Brief page 7) would seem to have some application. However, upon examination of the case, it appears that the defendant was at large on bond and, while the Court's attention was occupied during the examination of a juror on his voir dire, voluntarily and without notice on the part of the Court, absented himself and returned to the court room without his absence being noticed by the Court until brought to the attention of the Court and the decision in that case is rested upon an estoppel based upon the defendant's own wrong.

Far from supporting the respondent's position, we claim that the case of Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202, and Lewis v. U. S., 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136, are directly and unequivocally in support of our point I (Original Brief on Submission, page 13).

Justice Shiras, in the case of Alexander Lewis v. U. S., supra, distinctly held that the presence of the defendant in a capital case at every stage of his trial was an essential element of due process of law which could not be waived by the defendant and that the proceeding of the trial in any respect in the absence of the defendant constituted error to reverse. This is a well-reasoned case and cites abundant authority. It recognizes the right of a defendant to waive his presence in cases of misdemeanor and in some cases of felonies but not in capital felonies. He quotes with approval Blackstone as follows:

> "The natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority:—" 1 Bl. Com. 133.

And further says:

> "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody to object to unauthorized methods."

Mr. Justice Harlan, in the case of Hopt v. Utah, dealing with a case where the absence occurred prior to the actual beginning of the trial by the jury but while the jury was being examined upon its voir dire by "triers" of the challenges, in a capital case in reversing a judgment of guilty against the defendant, says:

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned

as to the mode by which he may be deprived of his life or liberty and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures merely upon their own authority.'—1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation of atonement of the offense committed but the prevention of further offenses of the same kind.—4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential for the protection of one whose life or liberty is involved in a prosecution for a felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without due process of law required by the Constitution.''—Hopt v. People of Utah, supra.

We have searched the cases very diligently and have failed to find a single decision of the Supreme Court of the United States, or of a court of last resort of any American jurisdiction wherein the Court has upheld a conviction had at a trial on a charge of a capital felony where the defendant was detained in jail at a time when the court was in session with the jury present and the court instructed the jury in the absence of the defendant.

The cases seemed to be unanimous to the effect that **the right of the defendant to be present and hear everything the jury hears is essential to a trial conducted in conformance with the principles of due process of law.**

II.

It is respectfully submitted that the doctrine of error without injury can have no application in this case, and point II of respondent's brief is not well taken.

The case of McNutt v. State, 25 Ala. 129, 142 So. 773, is expressly based upon the principle of estoppel and was a misdemeanor trial. Under the doctrine of the Lee case, supra, it can have no application to a capital felony trial.

The case of Boyd v. State, 153 Ala. 41, 45 So. 591, is analogous to the McNutt case, supra, since it deals with a minor felony and a mere temporary absence of the defendant unnoticed by the Court. We have already pointed out reasons why the cases of Snyder v. Mass., supra, Whittaker v. State, 173 Ark. 1172, 294 S. W. 397, and Johnson v. U. S., supra, are not in point.

We forbear to go further with discussions of the cases cited by the respondent. Upon examination, it is found that they all deal with misdemeanors or minor felonies, or with absences before jeopardy began, or else they fully support our point I as set forth in our original brief on page 13.

III.

In point III of our original brief (page 23) we stated:

> **"The violation of a substantial constitutional right is conclusively presumed to be injury in a trial for a capital felony."**

In the Alabama cases of Jones v. State, supra, McGee v. State, supra, we have pointed out that the courts of last resort in the State of Alabama have held that Rule 45 of

the Supreme Court of Alabama has no application to an invasion of a constitutional right.

Indeed, Rule 45 set forth in appendix A to respondent's brief would be void and unconstitutional itself if it were to be construed in such manner as to be an attempted limitation, modification or abrogation of a constitutional right of a defendant.

By its very terms it purports to deal only with mere technical matters with respect to admission or rejection of evidence, instructions to the jury or rules of pleading or procedure. It makes no pretense to deal with any error with respect to the denial of a constitutional guarantee. The right to be present at the time a jury is instructed is so sacred that it was held in the case of Parfet v. Kansas City Life Insurance Company, 128 Fed. (2d) 361, Certiorari Denied, 63 S. Ct. 50, 317 U. S. 654, 87 L. Ed. 526, error requiring a reversal of a judgment for a court to instruct the jury in a civil proceeding in the absence of the plaintiff in the suit **even though substantial prejudice did not affirmatively appear.**

The Supreme Court of the United States refused to reverse this ruling of the Circuit Court of Appeals of the Tenth Circuit, thereby inferentially affirming it. The Constitution of the State of Alabama is a compact between the state and its citizen wherein certain rights are guaranteed to the citizen which cannot be infringed by acts of the Legislature or of the Courts. The infringement of these solemn covenants constitutes a denial of due process of law and a judgment rendered in violation of these sacred rights cannot be made to stand.

Rule 45 of the Supreme Court of Alabama, appendix A, respondent's brief, page 24, relating to error without injury cannot be made to apply to an invasion of a constitutional right. To permit such application of Rule 45 would permit the state, acting through its agency, to violate its compact with the people without the consent

of the people. The Constitution of Alabama can only be modified by amendments or changes made in accordance with constitutional process. The constitutional right of a defendant in a capital case to be present at his trial cannot be frittered away, whittled down, limited, nor destroyed by mere rules of court. The Constitution of the State of Alabama is like the sacred Ark of the Covenant and no person dare lay impious hands upon it, whether he be Governor, Judge, or Legislator. The right of a defendant to be present at his trial and at every stage of his trial comes to us from the earliest days of the common law with the adoption of Magna Charta. To deny this right is to deny due process of law preserved to every citizen of Alabama by the Constitution of Alabama, and when any officer of the State of Alabama, whether he be Governor, Legislator, or Judge, shall seek to deny this right and shall render a judgment in violation of this right, the Fourteenth Amendment of the Constitution of the United States denounces the act and renders the action null and void. Whither would we travel if we permit the sacred constitutional guarantees of the right to be present at every stage of the trial to be frittered away by rules of court or even the acts of the Legislature. Who will be the **man** to say whether the citizen is injured by the invasion of his constitutional right or whether the public is injured by the ignoring of the constitutional guarantees.

Rule 45 makes no pretense that it applies to invasion of constitutional rights. Its very terms refer to mere procedural matters in the course of the trial. It was adopted for the sole purpose of relieving the courts of the necessity of vacating judgments for mere violations of remedial rules of evidence, procedure and pleading. It was never thought that such a rule could have any bearing upon the consideration of a fundamental right growing out of the Constitution and it is rather astonishing to see the argument advanced that Rule 45 is superior to the Constitution of Alabama and the Constitution of the United States.

We say that the substantial right of the petitioner was injured. It is a substantial right of the defendant to be present at every stage of the trial. It is a substantial right of the defendant to be present when the Court is instructing the jury. It is a substantial right of the defendant not to be detained in jail by the process of the very court from which he is absent at the time the Court is instructing the jury. This right was taken away from him in the trial in the court below by an officer of the court detaining the petitioner in jail and thereby forcibly preventing him from being present when the Court was instructing the jury.

How does he know **what** occurred? How does he know **what** the jury said to the Court? How does he **know** what the Court said to the jury? True, he is **informed** by highly credible evidence as to what was done and said in his absence, but this is not the equivalent of knowledge. Neither is it the equivalent of an opportunity to be heard at the very time and place when the jury was being instructed in the first instance.

The argument of counsel for the State of Alabama in opposition to the petition for writ of certiorari constitutes a confession and attempted avoidance. The invasion of the constitutional right appears substantially confessed and is sought to be avoided.

Yet there is not a single authority cited by learned counsel where the courts have held that a defendant may be forcibly detained in jail at a time when he is on trial for a capital felony and the Court is instructing the jury. The attempt by petitioner to distinguish the Lee Case (13 So. [2d] 583, 591) is not supported by reading of the Lee Case itself. The Lee Case predicates the reversal of the court below upon the violation of the constitutional right to be present at every stage of the trial. No mention is made of Title 30, Section 101, Code of Alabama 1940, in

the decision. The Court of Appeals in rendering its opinion said:

> "The inquiry, then, is whether or not the defendant may—or can—juridically divest himself, by consent or waiver, of this constitutional protection and it has been held to be a constitutional right (State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; Lewis v. United States, 146 U. S. 370, 374, 13 S. Ct. 136, 137, 36 L. Ed. 1011, 1013; Hopt v. Utah, 110 U. S. 574, 579, 4 S. Ct. 202, 28 L. Ed. 262; Percer v. State, 118 Tenn. 765, 103 S. W. 780; Riddle v. Commonwealth, 216 Ky. 220, 287 S. W. 704) to be personally present when the verdict of the jury is returned. In other words, is his personal presence at the rendition by the jury of the verdict against him in a felony case—here a trial for a capital offense—indispensable to the validity of the proceedings, or can he waive his personal presence during this critical stage of the trial?" Lee v. State, 13 So. (2d) 583-586.

The Supreme Court of Alabama also said in the Lee Case, supra:

> "The right to be present is said to be guaranteed by the Constitution, Section 6, to be heard by himself and counsel, that he may discuss questions of law and fact which may arise and that he may examine the jury by the poll to ascertain if they are certain."

It is thus seen that this right depends upon the Constitution of Alabama and not upon a mere section of the Code of Alabama.

That the invasion of the constitutional right to be present **requires** a reversal without any showing of injury is established also by the Lee Case, supra. There was no showing of injury to the defendant in the Lee Case other than an invasion of his constitutional right, which he had personally waived and to which he had personally con-

sented. The Court very reluctantly reversed the judgment in the Lee Case, evidently convinced that the verdict was not influenced to any degree and that the result was in no sense different from what it would have been had the defendant's constitutional right not been invaded. The Court said:

> "We confess our reluctance in so ruling **here** where a generous and considerate court allowed this unusual procedure to be undertaken as a convenience to the defendant. But the law must rule all cases alike. Consistency in just judicial pronouncements must be maintained. The principle 'stare decisis et non quieta movere' is firmly imbedded in our judicial fabric. Temporal winds of expediency in law trials should not be permitted to invade our fundamental rules." Lee Case, supra.

And the Supreme Court of Alabama in examining this case said:

> "The constitutional safeguard of Section 6, supra, it is also conceded, may be waived in a misdemeanor case, though Section 6 is not limited in its scope.
>
> "(5) The direct and positive assertions of this court in respect to the necessity of defendant's presence to sustain a verdict are but the statement of a universal principle existing in the common law. The right to waive his presence is not involved in any such statement. The question of such right to waive goes deeper in our judicial history than the constitutional provisions and deeper than the effect upon the defendant himself of receiving a verdict in his absence, and it is a rule of public policy inherited from the common law." Lee v. State, 13 So. (2d) 591, 592.

It is, therefore, confidently asserted that each of these petitioners will be deprived of their liberty in violation of due process of law, contrary to the provisions of the

Fourteenth Amendment of the Constitution, if the judgment of conviction here shown to be erroneous is permitted to stand. The presence of the defendant at every stage of his trial is essential under common-law principles to due process; it is essential under Section 6 of the Constitution of Alabama. It is essential to due process of law according to the principle of stare decisis under the decisions of the courts of last resort of the State of Alabama; that it is so essential to due process of law that it does not fall within the scope of Rule 45 of the Supreme Court of Alabama is established by the decisions in the Lee, Jones and McGee Cases, supra. That the doctrine of stare decisis is applicable and required the courts of Alabama to rule upon the instant case in accordance with the principles announced in the long and consistent line of cases is established by the Court of Appeals' decision in the Lee Case and to refuse to these petitioners the application of the doctrine of stare decisis of itself constituted a denial of due process of law.

Respectfully submitted,

G. ERNEST JONES,
Counsel for Petitioners.

RODERICK BEDDOW,
C. L. HYBART,
Of Counsel for Petitioners.

Certificate.

I hereby certify that I have forwarded copy of the foregoing Reply Brief and Argument to the Honorable William N. McQueen, Acting Attorney General, State of Alabama, Montgomery, Alabama, on this the 10th day of April, 1944.

G. Ernest Jones,
Counsel for Petitioners.